No. 95-813

In The

Supreme Court of the United States

October Term, 1995

BRAD BENNETT, et al.,

Petitioners,

v.

MARVIN PLENERT, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICUS CURIAE OF THE ASSOCIATION OF CALIFORNIA WATER AGENCIES, THE STATE WATER CONTRACTORS, AND THE CENTRAL VALLEY PROJECT WATER ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
A Professional Corporation
THOMAS W. BIRMINGHAM
Counsel of Record
CLIFFORD W. SCHULZ
JANET K. GOLDSMITH
WILLIAM T. CHISUM
Of Counsel
400 Capitol Mall, 27th Floor
Sacramento, California
95814
(916) 321-4500

BEVERIDGE & DIAMOND
DANIEL J. O'HANLON
Of Counsel
One Sansome Street,
Suite 3400
San Francisco, California
94104
(415) 397-0100

Attorneys for Amici Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

The "Citizens Suit" provision of the Endangered Species Act of 1973 (16 U.S.C. § 1540(g)(1)) provides "any person" may commence a civil suit on his own behalf to enjoin the United States from violating the provisions of the Act or regulations issued thereunder. The questions presented are:

1. Whether standing under the Citizens Suit provisions of the Endangered Species Act is subject to a zone of interest test as a further, judicially imposed, prudential limitation on standing;

2. If standing to sue under the Endangered Species Act is subject to prudential limitations, whether those limitations restrict standing to litigants who assert an interest in the preservation of endangered species to challenge government conduct alleged to violate the terms of the Act.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

DECISION BELOW

The decision of the United States Court of Appeals for the Ninth Circuit, *Bennett v. Plenert*, is reported at 63 F.3d 915 (9th Cir. 1995).

INTEREST OF *AMICI*

Pursuant to Rule 37.2 of the Rules of the Supreme Court of the United States, the Association of California Water Agencies, the State Water Contractors, and the Central Valley Project Water Association respectfully submit this brief *amicus curiae* in support of Petition for Writ of Certiorari. Consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

The people of the State of California are highly dependent upon an intricate network of highly developed water projects to convey water to their cities and farms. This dependence arises from a geographical imbalance of supply and demand. Roughly 75 percent of California's water resources are found north of the Sacramento/San Joaquin River Delta, while approximately 75 percent of the urban and agricultural water demand within California occurs south of the Delta. To deal with this geographical imbalance, both the state and federal governments have constructed water projects which transfer water from where it is found to where it is consumptively used. Together, the State Water Project, an element of the State Water Development System ("State Water System"), and federal Central Valley Project provide water to more than two-thirds of California's urban population and the vast

majority of its farmland. The Sacramento/San Joaquin River Delta is a critical link in the conveyance of California's water from the north to the south.

Amicus, Association of California Water Agencies ("ACWA"), is a non-profit incorporated association of 420 local public agencies which supply and manage California water resources. These agencies supply water, at the wholesale or retail level, or both, to nearly all urban households in California and to more than 8 million acres of farmland. ACWA members also provide flood control for millions of Californians and manage many of the State's groundwater basins. Many of the members of ACWA receive their water supply directly or indirectly from the State Water System, from the federal Central Valley Project, or from the Colorado River Basin Project.

Amicus, State Water Contractors ("Contractors"), is a non-profit incorporated association comprised of 27 public agencies formed under the laws of the State of California. Each of the agencies holds a contract with the State of California to receive water from the State Water System. By means of these contracts, the State Water System supplies water to some 21 million urban residents and nearly a million acres of farmland.

Amicus, Central Valley Project Water Association ("CVPWA"), is a non-profit incorporated association comprised of 80 public agencies formed under the laws of the State of California. Each of the agencies holds a contract with the United States Department of Interior, Bureau of Reclamation, to receive water from the federal Central Valley Project. By means of these contracts, the Central Valley Project provides 4 million households and

3 million acres of farmland with all, or a portion, of their water supply.

Historically, the balance between distribution for consumptive use by water users, on the one hand, and the allocation of water for environmental maintenance or enhancement, on the other, was determined by provisions of water right permits or licenses issued by the State of California. *See California v. United States*, 438 U.S. 645 (1978); *see also*, California Water Code §§ 1243, 1243.5 and 1257.5. More recently, however, the operations of water projects, particularly, the State Water System, the Central Valley Project, and the Colorado River Basin Project, and thus, the balance between consumptive and environmental water use, have been significantly affected by directives of the United States Fish and Wildlife Service and National Marine Fisheries Service under authority of the federal Endangered Species Act ("Act"), 16 U.S.C. § 1531 *et seq*. This fundamental shift in regulatory authority results from the fact that the Sacramento/San Joaquin River Delta and the Colorado River provide habitat for numerous aquatic species listed under the Act.

The winter-run Chinook salmon, an anadromous species listed as endangered, 50 C.F.R. § 17.11, uses the Delta as part of its migration corridor to and from the Pacific Ocean. The Delta smelt, listed as a threatened species, *id.*, is largely resident within the Delta year round. Four native fish species that inhabit the Colorado River are federally listed as endangered: the Colorado squaw fish, the humpback chub, the bonytail, and the razorback sucker. *Id*. Based upon the conclusions of the United States Fish and Wildlife Service and the National Marine

Fisheries Service regarding requirements for the preservation of these species, the operational standards and criteria for water projects have been radically altered. As a result of these changes, the water supply available to California's cities and farms has been significantly reduced, and the ability of *Amici*'s members to meet the water supply needs of their constituents has been directly impaired.

California also provides habitat for many terrestrial species listed as threatened or endangered under the Act. Actions taken to protect these species affect the operations of agencies which comprise *Amici*. In the San Joaquin Valley of California, routine activities to maintain water conveyance facilities are disrupted or precluded because those activities may harm the habitat of the San Joaquin kit fox or Tipton kangaroo rat. Similar activities are affected in the Sacramento Valley of California in order to prevent harm to the giant garter snake.

In addition to receiving water from the State Water System, the Central Valley Project, or the Colorado River Basin Project, many member agencies of ACWA, CVPWA, or the Contractors have constructed, or are constructing, their own water projects. Regulation under the Act has significantly affected these efforts. For example, to provide habitat for the least Bells vireo and other listed species, Metropolitan Water District of Southern California, a member of ACWA and the State Water Contractors, was required to purchase and set aside substantial acreage in connection with its effort to construct Domenigoni Valley Reservoir. Contra Costa County Water District, a member of ACWA and the CVPWA, also was required to create an endangered species reserve in connection with

its efforts to construct its Los Vaqueros Reservoir Project in the Sacramento/San Joaquin Delta.

As of June, 1993, California provided habitat to 109 species listed as endangered or threatened pursuant to the Act and 48 species proposed for listing. Regardless of the region in which a member agency of either ACWA, the Contractors, or CVPWA finds itself, its water supply or operations are likely to be affected by efforts undertaken to protect one of these species.

STATEMENT OF THE CASE

Petitioners are ranchers and irrigation districts which receive water from the Klamath Project, operated by the Bureau of Reclamation ("Bureau"). *See*, Complaint, ¶¶ 5 and 9. As a result of a consultation between the Bureau and the United States Fish and Wildlife Service pursuant to Section 7 of the Act, water in two Klamath Project reservoirs that otherwise would have been allocated to Petitioners was maintained in the reservoirs, purportedly to avoid jeopardy to the Lost River sucker and the shortnose sucker, which were listed as endangered in 1988. Complaint, ¶¶ 10, 14-19, 21.

Petitioners filed suit against Respondents, the Secretary of Interior, and Fish and Wildlife officials pursuant

to the Citizens Suit provision of the Act.[1] It was alleged in their Complaint that Respondents violated the Act by: (1) determining under Section 7(a)(2) of the Act[2] that the proposed operation of the project would result in jeopardy to the fish, and that restrictions should be imposed on withdrawals for irrigation, without data to support those conclusions and in the face of information suggesting that fish populations were stable;[3] and (2) by issuing a biological opinion which, by setting forth hydrologic requirements in reservoirs where the suckers live, implicitly determined "critical habitat" for the fish under Section 4 of the Act without considering the economic

---

[1] Section 11(g)(1), 16 U.S.C. § 1540(g)(1) provides, in pertinent part:

> Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf
>
> (A) to enjoin any person, including the United States . . . who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof.

[2] Section 7(a)(2), 16 U.S.C. § 1536(a)(2) provides, in pertinent part:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, ensure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined . . . to be critical, unless such agency has been granted an exemption for such action. . . . In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

[3] Complaint ¶¶ 9-21, 24-29.

impacts of that critical habitat designation, as required under Section 4(b)(2) of the Act. Complaint, ¶¶ 22, 31.[4]

The United States District Court for the District of Oregon granted Respondents' Motion to Dismiss for lack of prudential standing, and the United States Court of Appeals for the Ninth Circuit, in an opinion by Judge Reinhardt, affirmed.

In its opinion, the Court of Appeals rejected Petitioners' contention that the prudential "zone of interest" test was rendered inapplicable by the Act's Citizens Suit provision. 63 F.3d at 918. The Court held that Petitioners failed the "zone of interest" test because "only plaintiffs who allege an interest in the *preservation* of endangered species fall within the zone of interests protected by the ESA." *Id.* at 919 (emphasis in original). The Court concluded that only species preservation interests satisfy the "zone" test because "the overall purposes of the ESA are singularly devoted to the goal of ensuring species preservation; they do not embrace the economic and recreational interests that underlie the [Petitioners'] challenge." *Id.* at 920. Because Petitioners use project water for irrigation and recreation, not species preservation, the Court of Appeals concluded that Petitioners were asserting a "competing interest" in the water that

---

[4] Section 4(b)(2), 16 U.S.C. § 1533(b)(2) provides, in pertinent part:

> The Secretary shall designate critical habitat . . . on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat.

was "inconsistent with the Act's purposes." *Id.* at 921. Finally, the Court concluded that, notwithstanding the mandate of Section 4(b)(2) requiring the Secretary to consider the economic impacts of designating critical habitat, Congress "did not intend impliedly to confer standing on every plaintiff who could conceivably claim that the failure to consider one of those factors adversely affected him." *Id.*

ARGUMENT

I. APPLICATION OF THE ZONE OF INTEREST TEST FRUSTRATES CONGRESSIONAL POLICY CONCERNING DEFERENCE TO STATE REGULATION OF WATER RESOURCES.

Embodied in numerous federal statutory schemes is a deference to regulation of water resources by the states. This deference is stated expressly in Section 8 of the Reclamation Act of 1902, which provides, in pertinent part:

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

43 U.S.C. § 383. *See also, PUD No. 1 v. Washington Dept. of Ecology,* ___ U.S. ___, 114 S. Ct. 1900, 1912-1914 (1994) (Clean Water Act, 33 U.S.C. § 1251 *et seq.*, to be administered so as to avoid interference with state's water allocations).

Similar deference was expressed by Congress when in 1982 it amended the Endangered Species Act. Public Law 97-304 § 9(a) (96 Stat. 1426). Section 2(c)(2) of the Act provides:

> It is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species.

16 U.S.C. § 1531(c)(2).

This 1982 amendment to the Act granted to local water agencies, such as Horsefly Irrigation District and Lingell Valley Irrigation District, special status in obtaining federal cooperation in resolving water resource management issues with minimal conflict with the Act. Thus, these agencies have a unique interest that is entitled to protection under the terms of the Act, and application to such agencies of prudential standing principles frustrates the Congressional policy of promoting cooperation between federal agencies and local agencies to resolve such issues.

II. THIS CASE PRESENTS AN OPPORTUNITY FOR THIS COURT TO CLARIFY THE ZONE OF INTERESTS TEST.

The "zone of interest" test was first enunciated as a standing requirement in *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970). In that case, the Court held that a plaintiff seeking judicial review under the Administrative Procedure Act must demonstrate that "the interest sought to be protected by [the litigant was] arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 153. The Court's next expression concerning the limits of this prudential doctrine was in *Clarke v. Securities Industry Association*, 479 U.S. 388, 399 (1987), in which the Court observed the zone of interest test "is not meant to be especially demanding." The Court explained:

> In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.

Id.

This petition presents an opportunity to address an important question of federal law which has not been, but should be, settled by this Court. That is, in the application of the zone of interest test, should a court consider an act of Congress as a whole, including the means and limitations specified by the Congress in the various sections of the Act, or should a court focus exclusively on

what it discerns as the primary purpose of the act and limit the zone of interest to furtherance of that purpose? *Compare, Central Arizona Water Conservation District v. U.S. E.P.A.*, 990 F.2d 1531, 1538-1539 (9th Cir. 1993), *cert. den.*, ___ U.S. ___, 114 S. Ct. 94 (1993) *with Bennett v. Plenert*, 63 F.3d at 919-922.

This Court has warned lower courts before of the dangers of focusing solely on the broad purpose of a statute and ignoring its individual sections. In *Rodriguez v. U.S.*, 480 U.S. 522, 525-526 (1987) (per curiam) this Court explained:

> [N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law. (emphasis in original)[5]

The Court of Appeals held in this case "that only plaintiffs who allege an interest in the *preservation* of

---

[5] More recently, in dissent in *Babbitt v. Sweet Home Ch. of Commun. for Great Or.*, ___ U.S. ___, 115 S. Ct. 2407, 2426 (1995), Justice Scalia noted:

> Deduction from the "broad purpose" of a statute begs the question if it is used to decide by what *means* (and hence to what *length*) Congress pursued that purpose; to get the right answer to that question there is no substitute for the hard job (or in this case, the quite simple one) of reading the whole text. "The act must do everything necessary to achieve its broad purpose" is the slogan of the enthusiast, not the analytical tool of the arbiter.

endangered species fall within the zone of interests protected by the ESA." 63 F.3d at 919 (emphasis in original). In reaching this conclusion, the Court observed:

> The overall purposes of the ESA are singularly devoted to the goal of ensuring species preservation; they do not embrace the economic and recreational interests that underlie the plaintiffs' challenge.

Id. at 920.

From this statement, it is apparent that in conducting its "zone of interest" analysis, the Ninth Circuit focused on the primary purpose of the Act, but did not consider the limitations on or means of achieving that purpose specified by Congress to be relevant to its inquiry. Had the Ninth Circuit done so, it would have discovered that Congress indeed has considered the interests of persons affected by regulation under the Act and has attempted to require federal agencies to consider such impacts in their decisionmaking. In Section 4(b)(2), for example, one of the sections which Petitioners sought to enforce, Congress has directed that when the Secretary designates critical habitat, he is to "[take] into consideration the economic impact . . . of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2).

This section, among others, was added to the Act in 1978:

> [T]o retain the basic integrity of the Endangered Species Act, while introducing some flexibility which will permit exemptions from the Act's stringent requirements. At the same time, the legislation aims to improve the listing process and the public notice process of proposed listing

> and designations. These improvements will insure that all listing and designations are made by the Department of Interior only after a thorough survey of all of the available data, and only after notice to the local communities that will be most affected by any listing or designation. . . .

H.R. Rep. No. 1625, 95th Cong., 2nd Sess. 14 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9464.

In its section-by-section analysis of the 1978 amendment to the Act, the House Report No. 95-1625 stated:

> Up until this time, the determination of critical habitat has been purely a biological question. With the addition of this new paragraph, the determination of critical habitat for invertebrate takes on significant added dimensions. Economics and any other relevant impact shall be considered by the Secretary in setting the limits of critical habitat for such a species. . . .
>
> [T]he result of the committee's proposed amendment would be increased flexibility on the part of the Secretary in determining critical habitat for invertebrates. Factors of recognized or potential importance to human activities in an area will be considered by the Secretary in deciding whether or not all or part of that area should be included in the critical habitat of an invertebrate species. . . .

Id. at 17 (1978 U.S.C.C.A.N. at 9467.)

These statements exhibit a Congressional intent to expand the Secretary's analysis when designating critical habitat to include an analysis of the designation's impact on a community's economy. The Petitioners' economic

injury here falls within the "zone of interest" protected by Section 4(b)(2) of the Act; it satisfies the zone of interest test, provided the analysis includes consideration of Section 4(b)(2). As discussed in Petitioners' brief, Sections 2(c)(2) and 7(b)(3)(A) further reflect an effort by Congress to reconcile species protection with other legitimate objectives. Only by focusing exclusively on the primary overall purpose of the Act, and ignoring these sections, could the Ninth Circuit conclude that Petitioner's interests fall outside of the zone of interest protected by the Act. This case, therefore presents the Supreme Court with an opportunity to define how the "zone of interest test" is to be applied for purposes of prudential standing.

III. PRUDENTIAL STANDING IS INAPPLICABLE TO PETITIONERS WHO STAND IN PLACE OF THE AGENCY DIRECTLY REGULATED.

In its opinion, the Ninth Circuit acknowledged that the prudential standing doctrine embodied in the zone of interest test does not apply in circumstances where the litigants stand in the same position as the entity regulated directly. 63 F.3d 920 n.6, *citing, Clarke v. Securities Industry Association*, 479 U.S. at 400. In the circumstances of this case, the Petitioners do stand in the position of the entity directly regulated. In addition, only Petitioners can enforce the purposes for which Congress amended the Act.

Pursuant to Section 8 of the Reclamation Act of 1902, the right to the use of water acquired by the Bureau

under provisions of the Federal reclamation law is appurtenant to the land irrigated. 43 U.S.C. § 372. Indeed, one district court has analogized the relationship between a water user and the Bureau to the relationship between an owner of property and a lienholder:

> The water right on the Newlands Project covered by approved water right applications and contracts are appurtenant to the land irrigated and are owned by the individual landowners in the Project. . . . The United States may have title to the irrigation works, but as to the appurtenant water rights it maintains only a lienholder's interest to secure repayment of the project construction costs.

United States v. Alpine Land and Reservoir Co., 503 F. Supp. 877, 879 (D. Nev. 1980), *modified*, 697 F.2d 851 (9th Cir.) *cert. den.*, 464 U.S. 863 (1983); *see, also, Ickes v. Fox*, 300 U.S. 82, 94-95 (1937), *reh'g den.*, 300 U.S. 640 (1937).

In this case, Petitioners who sought to enforce the Act stand in the same position as the Bureau, the agency regulated directly. The water left in Gerber and Clearlake Reservoirs as a result of the consultation between the Bureau and the Fish and Wildlife Service was water which Petitioners were entitled to use. 43 U.S.C. § 372.

It is for this additional reason that the application of the prudential standing rule to Petitioners is particularly inappropriate. In the circumstances of this case, the regulated agency is a sister agency of the regulator within the Department of Interior. It is therefore inconceivable that the Bureau would bring and diligently prosecute an action to enforce the Act. Petitioners, on the other hand, are in reality the "object of the action" at issue. *Lujan v.*

Defenders of Wildlife, 504 U.S. 555, 561 (1992). They have the greater interest in enforcing the statute, and the zone of interest test should not bar their action.

IV. THE COURT OF APPEALS' APPLICATION OF THE ZONE OF INTEREST TEST IMPLICATES PUBLIC POLICY CONCERNING ACCESS TO THE COURTS.

The right of access to courts is but one aspect of the First Amendment right to petition government for redress of grievances. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). Although this right is limited by numerous principles, including standing, the creation of artificial barriers should be thoroughly scrutinized.

There exists in the western United States today a growing disrespect for the federal government's management of natural resources. *Unrest in the West*, Time, Oct. 23, 1995, at pp. 52-66. In considerable part, this frustration has resulted from what is perceived to be the onerous and unjustified application of the Endangered Species Act. *This Land is Whose Land?*, Time, Oct. 23, 1995, at pp. 68-71. In some circumstances, this disrespect has resulted in intentional disobedience of the law without apparent concern by local law enforcement agencies. *Recording Indicates Rancher, Not Agents, Aggressive*, The Idaho Statesman, Sept. 14, 1995.

Unlawful conduct should be neither encouraged nor condoned; however, *Amici* query whether the Court of Appeals' decision in this case will not further exacerbate

the contempt with which some individuals regard the government. Logic suggests that it will.

In this case, ranchers and irrigation districts who are directly affected by implementation of the Act are being told that, notwithstanding the broad language in the Citizens Suit provision of the Act, they are barred from raising their grievances in court because their interests compete with those of the Lost River sucker and shortnose sucker. 63 F.3d at 921. In other words, no matter that the action of the Fish and Wildlife Service may be arbitrary or taken in violation of the provisions of the Act, Petitioners are barred from seeking redress for their grievances through the courts; instead, the judicial system is open only to those who allege an interest in the preservation of endangered species.

The frustration of individuals in the position of Petitioners is easily understood. However, such frustration is needless. Congress has not indicated any intent to limit standing beyond the requirements of Article III. To the contrary, Congress has provided standing to "any person" aggrieved by violation of the Act. 16 U.S.C. § 1540(g)(1). The zone of interest test should not be employed to bar truly aggrieved litigants from the courthouse. Assuming the test is applicable, the Court of Appeals' narrow focus on the primary purpose of the Act generally, as opposed to individual sections which litigants seek to enforce, is unwarranted. It furthers neither the multiple purposes of the Act, nor the purposes served by the prudential standing doctrine.

CONCLUSION

For the foregoing reasons, *Amici* submit that the Petition for Certiorari should be granted.

DATED: December 21, 1995

Respectfully submitted,

KRONICK, MOSKOVITZ,
TIEDEMANN & GIRARD
A Professional Corporation
THOMAS W. BIRMINGHAM
Counsel of Record
CLIFFORD W. SCHULZ
JANET K. GOLDSMITH
WILLIAM T. CHISUM
Of Counsel
400 Capitol Mall, 27th Floor
Sacramento, California
95814
(916) 321-4500

Attorneys for Amici Curiae

BEVERIDGE & DIAMOND
DANIEL J. O'HANLON
Of Counsel
One Sansome Street,
Suite 3400
San Francisco, California
94104
(415) 397-0100